

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 5, 2009 Session

DALE AND LAUREN STAFFORD v. ROBERT EMBERTON

Appeal from the Chancery Court for Montgomery County
No. MC CH CV CD-07-55 Laurence M. McMillan, Chancellor

No. M2008-02250-COA-R3-CV - Filed September 15, 2009

The trial court granted seller's motion for summary judgment on misrepresentation claims arising from the sale of real property based on an "as is" provision agreed upon by the parties. We affirm the summary judgment and find that the seller negated an essential element of the buyers' claims in his affidavit denying knowledge of the alleged defects. Buyer failed to meet his burden to create an issue of fact in any way about seller's knowledge. Alternatively, summary judgment is also sustained as to all the misrepresentation claims based on the "as is" provision, except the fraudulent misrepresentation claim which we find was not properly alleged in the complaint.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed and Remanded

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Joseph P. Weyant, Clarksville, Tennessee, for the appellants, Dale and Lauren Stafford.

Mart G. Fendley, Clarksville, Tennessee, for the appellee, Robert Emberton.

OPINION

The buyers of a home, Dale and Lauren Stafford, sued the seller, Robert Emberton, for misrepresentation and statutory violations of the Tennessee Residential Property Disclosure Act, Tenn. Code Ann. § 66-5-201 *et seq.* ("TRPDA") and the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 *et seq.* ("TCPA").

On September 27, 2006, the parties entered into a residential Purchase and Sales Agreement ("Sales Agreement"). The Staffords were provided with the Tennessee Residential Property Condition Disclosure ("Disclosure") a day earlier, on September 26. Incorporated into the Sales Agreement was an Occupancy Agreement for Buyer Prior to Closing executed by the parties. The Staffords apparently had no inspection performed on the home. The Staffords moved into the home

on September 28, 2006. The parties closed on the sale over a month later, on November 3, 2006.

More than a year after they moved into the home, the Staffords filed suit on November 2, 2007. The complaint alleged defects with the pool grounding and drain pipe that were not identified on the Disclosure. It also alleged that the roof, plumbing, water heater, and appliance repairs were not performed as represented by the seller's agent. According to the complaint, these needed repairs "are in potential disharmony" with the Disclosure signed by Mr. Emberton. The complaint alleges that the foregoing misrepresentations were negligent and fraudulent and violated the TRPDA and TCPA.

The trial court granted Mr. Emberton's motion for summary judgment. The Staffords appeal.

I. SUMMARY JUDGMENT

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76, 84 (Tenn. 2008); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). We review the summary judgment decision as a question of law. *Id.* Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair*, 130 S.W.3d at 763.

The moving party has the burden of demonstrating it is entitled to judgment as a matter of law and that there are no material facts in dispute. *Martin*, 271 S.W.3d at 83. To be entitled to summary judgment, a defendant moving party must either (1) affirmatively negate an essential element of the non-moving party's claim or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1, 9 (Tenn. 2008). If the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of a genuine issue of material fact. *Martin*, 271 S.W.3d at 84; *Hannan*, 270 S.W.3d at 5; *Staples v. CBL & Associates*, 15 S.W.3d 83, 86 (Tenn. 2000) (citing *Byrd v. Hall*, 847 S.W.2d at 215).

II. ANALYSIS

Mr. Emberton filed a motion for summary judgment. The Staffords' Response to Mr. Emberton's Statement of Undisputed Facts ("Statement") was cited by Mr. Emberton in support of summary judgment. Paragraph 20 of the Statement provides as follows:

20. **RESPONDENT'S AVERMENT**: The Defendant did not know of any of the damage and/or problems set out in the Plaintiff's Complaint. Per paragraph 10 of Robert Emberton's Affidavit.

RESPONSE: The Petitioners Deny the truth of this statement. The Complaint speaks for itself. See also Affidavit of Dale Stafford.

Mr. Emberton's affidavit referenced above states that he repaired or contracted for the repair of problems identified in an inspection prior to closing¹ and "I never had any knowledge of the damage and/or problems set out in the Plaintiff's Complaint."

Mr. Emberton successfully negated essential elements in all of the Staffords' claims when he gave a sworn affidavit that he was not aware of any of the damage and/or problems described in the Staffords' complaint. In order to be liable for misrepresentation, one must have some knowledge that the fact allegedly misrepresented was false.² *Walker v. Sunrise Pontiac - GMC Truck, Inc.*, 249 S.W.3d 301, 311 (Tenn. 2008); *Ingram v. Cendant Mobility Financial Corporation*, 215 S.W.3d 367, 371 (Tenn. Ct. App. 2006).

It was then the Staffords' duty to come forward with evidence to create factual issues about whether Mr. Emberton was aware of the problems. The Staffords' response to Mr. Emberton's sworn denial simply references the complaint and Mr. Stafford's affidavit generally.

As an initial matter, it should be noted that the complaint makes thin reference to any misrepresentation by Mr. Emberton. The only specific misrepresentation was allegedly made by the agent and the allegation about Mr. Emberton is that the alleged unperformed repairs were in "potential disharmony" with the Disclosure signed by Mr. Emberton. In any event, the Staffords cannot rely on mere allegations to counter Mr. Emberton's affidavit or simply deny the accuracy of that testimony. Mr. Stafford's affidavit likewise fails to create a factual issue. His affidavit asserts misrepresentation by the real estate agent and general unspecified misrepresentations by Mr. Emberton, but no evidence to support whether these defects even existed at the time of closing or that Mr. Emberton was aware of any falsity.

Since there existed no genuine issue of material fact, the trial court did not err in granting Mr. Emberton summary judgment.

Alternatively, we find dismissal is also supported by the grounds relied upon by the trial court, namely that the Staffords agreed to purchase the property "as is." Paragraph 16 of the Statement provided as follows:

16. **RESPONDENT'S AVERMENT:** Paragraph 10 of the Occupancy Agreement for Buyer Prior to Closing specially states: "**Buyer agrees that they have carefully inspected the premises prior to signing this Agreement** (emphasis added), and without reservation accept the Property as suitable and ready for use as their home, that all repairs or replacement have been completed to their satisfaction, and that they will repair and maintain said property during the term of this agreement

¹The record makes reference to an inspection report performed for an earlier potential buyer.

²Under the TRPDA, absence of knowledge of a defect is a defense. Tenn. Code Ann. § 66-5-204(a)(1). The TCPA claim also fails since it was admitted that Mr. Emberton does not generally engage in the real estate trade. *Ganzevoort v. Russell*, 949 S.W.2d 293, 298 (Tenn. 1997).

at their own expense. Seller shall have no obligations for repair or replacements after the date of occupancy.” Per paragraph 13 of the Affidavit of Betty Warfield.

RESPONSE: Petitioner Admits the truth of this statement for purposes of this summary judgment motion only.

Exculpatory clauses are valid in Tennessee, and the agreement by the Staffords to accept the property “as is” defeats any *negligent* misrepresentation claims. *Ingram*, 215 S.W.3d at 371. This is true since this “as is” provision negates any reliance by the Staffords on the misrepresentation, which is an element of any misrepresentation claim. *Id.* As for the *fraudulent* misrepresentation claim, the Staffords never alleged that Mr. Emberton represented a material fact that he knew to be false. *Walker*, 249 S.W.3d at 311. Alleging “potential disharmony” does not amount to an allegation of fraud.

For the foregoing reasons, the trial court’s grant of summary judgment is affirmed.³ Upon request of Mr. Emberton, the matter is remanded to the trial court for consideration of whether Mr. Emberton is entitled to attorneys’ fees related to this appeal as a matter of contract. Costs of this appeal are taxed to the appellants, Dale and Lauren Stafford.

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³On appeal, the Staffords argue that they were not provided sufficient opportunity to conduct discovery and the summary judgment should be reversed on that ground. The record, however, contains no motion to this effect or any indication that the trial court was given an opportunity to consider this.